No. 14098

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Appellee.

Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S REPLY BRIEF

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QUESTION PRESENTED

The question in this appeal is whether the jurisdiction of federal district courts under Section 301 of the Labor Management Relations Act of 1947, as the court below held, is limited to damage suits or whether district courts have jurisdiction under this section to give declaratory relief in a suit for a breach of a collective bargaining agreement alone or together with ancillary injunctive relief.

REPLY TO ARGUMENT

Appellee, as is to be expected in the light of the lower court's ruling, phrases the question in reverse, making what appellant claims is the horse, the declaratory relief, the cart, and what appellant claims is the cart, the ancillary injunctive relief, the horse.

Appellee makes the simple question involved complex by stating what it calls the principal question and a secondary question. The principal question as stated by appellee is:

> whether a suit, by a party to a collective bargaining agreement between an employer and a union representing employees in an industry affecting commerce, seeking to enjoin the employer from continuing to carry out a retirement policy alleged to be in violation of the agreement, is within the jurisdiction of the federal district courts under Section 301 of the Labor Management Relations Act, 1947? [p. 4, Appellee's Brief]

The secondary question appellee poses is:

> if such an action is not within the jurisdiction of the district court, does the mere fact that the petitioner also seeks a declaration that the conduct alleged is a violation of such an agreement confer jurisdiction on the court to grant such declaratory relief under the Federal Declaratory Judgment Act? [p. 4, Appellee's Brief]

The nature of the suit must be determined by the facts alleged, the pre-trial order, and the relief sought. Appellant's suit is entitled "Complaint for Breach of Contract and Declaratory Judgment." The complaint alleges that appellee breached the collective bargaining agreement when it terminated the employment of one of its employees solely on the basis of age and then refused, pursuant to the requirement of the contract, to submit the matter to an arbitrator for decision. The first paragraph of the prayer for relief sought "that a declaratory judgment be made and entered herein determining and declaring the rights of petitioner and respondent under the collective bargaining agreement, and specifically declaring and adjudging that respondent breached the terms of the agreement . . ." (R. 8) The District Court's statement as to the nature of the proceedings in its pre-trial order reads:

> This is a suit for declaratory judgment, seeking to establish the rights of the petitioner union under a collective

> bargaining agreement and specifically to declare and adjudge that said collective bargaining agreement has been violated by the respondent with respect to an employee named Miyuki Takahama. It is prayed in this action that the respondent be enjoined from continuing to violate the collective bargaining agreement by retiring people of 65 years, for age. [R. 18]

Appellant's contentions of law, set forth in the District Court's pre-trial order are:

1. That the separation of Mrs. Takahama was a violation of the existing contract, Pre-Trial Exhibit No. 5, in that it was neither a layoff nor a discharge and was in no wise provided for by any of the contract's terms.
2. That Mrs. Takahama's grievance should have been arbitrated under the contract. [R. 21]

Thus every relevant fact in the record refutes appellee's description of the suit as "in the nature of an equitable action to enjoin an employer" (Appellee's Brief, p. 6) and a "bill in equity" (Appellee's Brief, p. 7).

While appellant sought ancillary relief in the form of an order enjoining the further breach of the agreement, it is clear that declaratory relief without more would have resolved the controversy between the parties.

An examination of the cases cited in appellant's opening brief, particularly *American Federation of Labor v. Western Union Telegraph Co.*, 179 F.2d 535 (CA 6 1950) (Appellee's Brief, p. 6 and 16; Appellant's Brief, p. 7), shows the source from which appellant drew the form of its complaint. Appellee does not distinguish these cases.

Appellant agrees with appellee that the "Federal Declaratory Judgment Act is not a jurisdiction conferring statute." (Appellee's Brief, p. 8) Appellant invoked the jurisdiction of the court under Section 301 of the Labor Management Relations Act. The cases cited by appellee relate to situa-

tions in which federal courts were held to be without jurisdiction to grant declaratory relief because one or more essential elements of jurisdiction were lacking under 28 U.S.C., Section 1332 and did not involve Section 301.

For example, in *Southern Pacific Co. v. McAdoo,* 82 F. 2d 121 (CA 9, 1936) (Appellee's Brief, p. 8), the court held that it had no jurisdiction because the amount in controversy fell short of the requisite jurisdictional amount. Jurisdiction in the case was based on diversity of citizenship and the alleged existence of a federal question. However, the court noted that an essential element, the jurisdictional amount, was lacking.

In *Marshall v. Crotty,* 185 F.2d 622 (CA 1, 1950) (Appellee's Brief, p. 8) the plaintiff sued for a declaratory judgment that he was entitled to reinstatement in his government post and in a supplementary complaint asked for a writ of mandamus in the event he was not reinstated within thirty days after the issuance of a declaratory judgment. The appellate court ruled that the district court lacked jurisdiction to entertain a direct proceeding for relief in the nature of mandamus. The court also held that any judgment entered in the matter would be futile since it would not be *res judicata* against the employee's superiors and the United States. The court's comment on this point is interesting. It said at page 627:

> "... A declaratory judgment does not command action, and here, indeed, coercive powers in the nature of mandamus would not be within the power of the district court. In some cases the declaratory judgment, without more, is not a futile thing, because of its effect as res judicata in determining the rights of the parties. Thus, if the parties to a contract have an actual controversy as to whether a certain proposed act would be a breach of contract, a declaratory judgment as to the meaning of the contract would be res judicata in a subsequent suit for breach of contract based on the doing of the act in question . . ."

A declaratory judgment here, without more, affords appellant relief and would be "*res judicata* in a subsequent suit for breach of contract," or arbitration. This would still be the situation so far as the past breach of contract is concerned, whether the agreement remains in effect or not.

The court in the case of *Putnam v. Ickes,* 78 F.2d 223 (D.C. Cir. 1935) (Appellee's Brief, p. 8), found among other things that the court lacked jurisdiction over most of the defendants and that the appellants had disclosed no interest in the subject matter of the suit to enable them to maintain an action.

In *Doehler Metal Furniture Co., Inc. v. Warren,* 129 F.2d 43 (D.C. Cir. 1952) (Appellee's Brief, p. 8), the court's opinion was that the complaint showed no actual dispute between the plaintiff and defendant on any question of law and that it failed to state a claim upon which declaratory relief could be granted.

Appellee quotes dictum taken out of context from the case of *Corcoran v. Royal Development Company,* 121 F.2d 957 (CA 2 1941) (Appellee's Brief, p. 9) in support of its position. There the plaintiff apparently attempted to circumvent the requirement of a jurisdictional amount by the use of a declaratory suit. No parallel exists between the situation presented here and the *Corcoran* case in any event, for the allegation of jurisdiction here is based squarely on Section 301.

Appellee argues (Appellee's brief, pp. 11–17) that the district courts have no jurisdiction over injunction suits. In support of this position, it cites several cases which are not in point. For example, the following cases involved charges of unfair labor practices which could only be enforced by the N.L.R.B.: *United Packing House Workers v. Wilson & Co.,* 80 F. Supp. 563 (N.D. Ill. 1948); *Haspel v. Bonnaz, Singer and Hand Embroiderers, Tuckers, Stitch-*

ers, and Pleaters Union, Local 66, 112 F. Supp. 944 (S.D. N.Y. 1953). *Duris v. Phelps-Dodge Copper Products Corp.,* 87 F. Supp. 229 (D.C. N.J. 1949), involved a question of representation within the jurisdiction of the NLRB. These cases are irrelevant because the Labor Management Relations Act of 1947 specifically gives the NLRB original jurisdiction over unfair practice and representation cases and Section 301 of the Act gives federal courts jurisdiction of actions for breach of contract such as involved herein.

In *Local 937, etc., v. Royal Typewriter Co.,* 88 F. Supp. 669 (D.C. Conn. 1949) (Appellee's Brief, p. 12), the court held that injunctive relief based on diversity jurisdiction was barred. Although the court seemed to feel that injunctive relief was barred on the ground that there was a labor dispute, it apparently did not feel confident of that fact for its final conclusion was that no irreparable injury to warrant an injunction was present.

A case which supports appellee's contention that injunctive relief in aid of a declaratory judgment cannot be granted is the case of *Alcoa S. S. Co. v. McMahon,* 81 F. Supp. 541 (S.D. N.Y. 1948) (Appellee's Brief, pp. 7, 11, 18). However, appellee admits that other courts considering the same question have come to a contrary conclusion. These cases have been cited in the appellant's opening brief.

The attention of the court is again directed to *Mountain States Division No. 17 Communications Workers of America v. Mountain States Telephone and Telegraph Co.,* 81 F. Supp. 397 (D.C. Colo. 1948) (Opening brief, p. 10). In a well-considered opinion, the court comes to the conclusion that injunctive relief designed to aid in the enforcement of a collective bargaining agreement is not barred by the provisions of the Norris-La Guardia Act. The court's holding on the question of damages is pertinent. At page 401 of the opinion, the court said:

> It is quite clear the plaintiff has no adequate remedy at law. Damages cannot be adequately measured for violation of the provisions of the contract, such as grievance procedure, arbitration, pensions, disability benefits, termination allowances, etc. To sum up: The contract confers rights and benefits on both parties that cannot clearly be ascertained or measured in damages. That contracts providing for check-off of union dues will be specifically enforced. See Sanford v. Boston Edison Co., 316 Mass. 631, 56 N.E.2d 1, 156 A.L.R. 644: 'Specific performance of a collective bargaining agreement will be granted where damages are an inadequate remedy and specific enforcement will not involve too great practical difficulties.'

District Judge Wyzanski of Massachusetts has also had occasion to deal with the problem of equitable relief under Section 301 and his analytic opinion in *Textile Workers Union of America (CIO) v. American Thread Co.*, 113 F. Supp. 137 (D.C. Mass. 1953) (Opening brief, p. 11), is persuasive. His scholarly discussion of the legislative history and purpose of the section rebuts appellee's assertion that the cases against them are all poorly reasoned. Appellee does not contradict the facts as to Legislative history on which the decision was based.

Unless this court holds, as did the district court, that Section 301 is limited to damage suits alone, appellant is entitled to a reversal of the lower court's order of dismissal.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

Dated at Honolulu, T. H., this 23rd day of February, 1954.

Respectfully submitted,

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